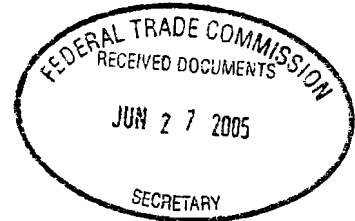


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June 27, 2005



BY HAND DELIVERY

Donald S. Clark  
Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Mr. Secretary:

I submit these comments pursuant to the Federal Trade Commission's (the "Commission") publication of proposed regulations ("Proposed Regs") further implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "Act"). 70 F.R. 25426 (May 12, 2005). Baker & Hostetler LLP represents direct marketers and others who are concerned about legitimate marketing efforts, efficient communications with consumers, and protection of proprietary information, including data about consumers.

The Commission should clarify the definition of a "sender" in a manner that will both further efficient communications in the marketplace and safeguard the privacy of consumer data as well. Specifically, I will address questions 1.b and 1.c regarding the definition of "sender" and the treatment of certain third-party list providers, that is, those who own the list and originally obtained permission from persons on the list. See 70 F.R. at 25450.

A. Brief Overview

Much of the Commission's proposed clarification of the term "sender" arises in the context of a single e-mail that contains the ads or promotional material of multiple advertisers. The focus, understandably in that context, is to find a way that allows compliance by a single "sender" that is consistent with the language and policy of the Act. The Commission expresses due regard for the logistical problems that would arise

from the need for multiple opt-outs, with attendant multiple communications of opt-out names to various “senders” whose products are advertised or promoted. The issue is all the more complicated when the multiple “senders” enlist the services of a single third-party list provider (“list provider”) who owns the list and agrees to send e-mails to persons in the list provider’s database who have given permission to the list provider to receive such commercial messages.

The main point of this comment is that the Commission also needs to address the situation where a single advertiser enlists the services of a third-party list owner/provider to e-mail advertisements on its behalf. If the list provider in that situation is treated solely as an “initiator” but not as a “sender,” there is a heightened risk that the e-mail addresses from the list provider’s proprietary files will have to be disclosed to advertisers as a matter of law, thereby potentially compromising whatever safeguards the list provider had in place for its proprietary information and creating the risk that the advertisers who receive such information may abuse it, so that the consumers who attempted to opt-out in the first place wind up getting more, rather than less, unsolicited e-mail.

The solution, as noted below and in answer to the Commission’s questions, is to assure that a list provider who initiates e-mails on behalf of an advertiser, using the names and e-mails addresses it owns and maintains in the list provider’s own proprietary file, is deemed to be the “sender” and that the opt-out notice should go to the list provider, rather than to the advertiser.

#### B. Concerns About Privacy of Consumer Information

Ironically, the May 12 proposal comes at a time when two types of events are occurring simultaneously. First, the public is greeted almost weekly, it seems, with news that another large database of confidential information has been breached. The implicit, sometimes explicit, message that accompanies the news is that owners of large databases of sensitive information may not be doing enough to protect their data from hackers and others.

At the same time, the FTC is bringing enforcement actions against companies who disclose consumer information, intentionally or by inadvertence, in violation of promises of confidentiality that they make to consumers by online privacy policies and

otherwise.<sup>1</sup> In some cases, companies are charged when the software they use is not capable of the level of protection they promised.<sup>2</sup>

In light of such news and such enforcement efforts (the merits of which are outside the scope of this comment), it is ironic indeed that a careless definition of “sender” could require list providers to disclose to advertisers (with whom they may not have had any prior business relationship) the addresses they own of clients on their proprietary lists who seek to opt-out after receiving the advertiser’s message via the list provider.

In addition, the initial disclosure from the list owner/provider to the advertiser can produce downstream effects that could compound the problems of the initial disclosures. For example, consider the situation of an advertiser who receives a number of the list provider’s confidential e-mail addresses of people who opted out after receiving the advertiser’s message. If the advertiser wanted to send another advertisement via a different list provider, it would be required to pass the very same e-mail addresses to the second list provider in order to be in compliance with the opt-out provisions of the Act and regulations.

Needless to say, the situation becomes a repeating pattern, with the rather amazing result that information regarding consumers who originally sent an opt-out message to the list provider who originally had obtained their permission and had maintained their data in strict confidence, is passed from one advertiser and list provider to another, in succession, until the original list provider has absolutely no control over the private information that has now been scattered widely among list providers and advertisers who have no “privity” at all with the underlying consumer.

### C. A Suggested Approach

Given the legitimate concerns about the need for businesses to maintain confidentiality of priority information to an acceptable standard, it is hard to imagine that the Commission would, by regulation, want to force a party in the position of a list provider to give up chunks of such data that it owns to advertisers with whom it has no relationship other than a short-term contract to send e-mails to its proprietary list. Indeed, in portions of the Federal Register notice, including the questions cited above, the

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<sup>1</sup> *In the Matter of Vision I Properties, LLC*, File No. 042-3068 (March 10, 2005); *In the Matter of Petco Supplies, Inc.*, File No 032-3221 (November 17, 2004); *In the Matter of Gateway Learning Corp.*, File No. 042-3047 (July 7, 2004); *In the Matter of MTS d/b/a Tower Records*, File No. 032-3209 (April 21, 2004).

<sup>2</sup> *In the Matter of BJ's Wholesale Club, Inc.*, File No. 042-3160 (June 16, 2005); *In the Matter of Guess Inc.*, File No. (022-3260)(June 18, 2003); *In the Matter of Microsoft Corporation*, File No 012-3240 (August 8, 2002); *In the Matter of Eli Lilly and Company*, File No. 012-3214 (January 18, 2002).

Commission appears to express frustration because the statutory definition of “sender” could exclude an initiating list provider who does not include its own “advertisement” in the e-mail and, for that reason, might not qualify as a “sender” under the Act.

I respectfully suggest that the Commission has used an incorrect and imprecise definition of “sender” in its Federal Register questions and that using the actual language of the statute provides a satisfactory answer to the identified problem. Specifically, the Commission asks rhetorically how a list provider could be deemed a “sender” in light of statutory language that defines “sender” in terms of “an entity that both initiates a message *and* advertises its product, service, or Internet web site in the message?” (emphasis in original). However, the question in the Federal Register comprises only part of the actual definition of “sender” contained in the Act. As noted in its March 4, 2005 letter to the Direct Marketing Association on a related point, the term “sender” in connection with commercial e-mail, means “a person who initiates such a message and whose product, service, or Internet web site is advertised *or promoted* by the message.” 15 U.S.C. § 7702(16)(A) (emphasis supplied).

In this context, the term “promoted” clearly is not coextensive with the term “advertised” and is not necessarily limited to the advertiser’s message, but extends to any promotion of a product, service, or Internet web site. Given the common dictionary meaning of “promote,” it is hardly a stretch to conclude that the list provider, while surely assisting in disseminating the advertiser’s message, is simultaneously “promoting” its own service and web site in the process – even if it is not in the form of a traditional “advertisement.” The fact that the list owner/provider uses its own name in the “from” line when it transmits the advertiser’s message is fair evidence that it is simultaneously “promoting” its own service. In that instance, treating the list owner/provider as the “sender” is also consistent with consumer expectations, inasmuch as the e-mail is coming “from” the party to which it originally gave its consent.

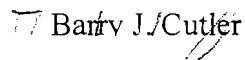
Given the desirability of preserving the propriety of consumer information to the maximum extent feasible and consistent with law, the Commission should give a broad interpretation to the definition of “sender,” apply it to list providers even when they are transmitting the advertisement of a single advertiser, and ensure that the opt-out process will take place between the consumer and the list provider who obtained the consumer’s permission in the first place.

I understand that some commentators may urge a similar approach and a similar result, basing their position on concerns about the integrity of certain classes of list providers. This comment, by comparison, is not based on any such characterization of list providers. To the contrary, it presumes that most list providers will be honest, desirous of protecting their proprietary information, but would be required, notwithstanding those elements, to compromise their database by passing along information of their customers who opt-out in response to a particular advertisement.

The net effect of implementing this suggestion would be to assure that e-mail addresses held in confidence by list providers will remain subject to their strict control, even when the people from whom they previously obtained permission to send e-mails later opt-out in response to a particular advertisement the list owner facilitates. List providers who want to preserve as many names as possible in their database will have an incentive to send messages that, in their estimation, are less likely to generate many opt-outs that would erode their database. It is not without irony that, without such a definition of "sender," the consumers in greatest jeopardy of losing their privacy interests are those who respond that they want to opt-out of future e-mails. The original list provider would have no choice but to start a chain of disclosures to advertisers and, ultimately, other list providers who do not have a commercial interest in protecting the privacy of the data as the original list provider who "owned" the information does.

For the foregoing reasons, I respectfully request that the Commission reconsider the definition of "sender" in a way that allows list providers who agree to broadcast an advertiser's message to a list of e-mail addresses that it owns and are associated with consumers that have given permission to the list owner/provider. Because such list providers typically put their own name in the "from" line, having the opt-out notice go to the list provider as "sender" would be consistent with the consumer's expectations. It would also allow the list provider to preserve the integrity its database even after excising opt-outs at the consumer's request.

Sincerely,

 Barry J. Cutler